In The

Supreme Court of the United States

No.....

THE WOMEN'S CATHOLIC ORDER OF FORESTERS,
Appellant Below,

vs.

THE CITY OF ENNIS, TEXAS, J. P. CLARK, R. R. THOMAS, J. N. GOODWIN, Commissioners, and E. C. HAWKINS, Treasurer, of Said City
Appellees Below.

OCTOBER TERM, 1940

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

-I-

The opinion of the United States District Court for the Northern District of Texas is copied at pages 109 and 113 of the Record, while the opinion of the United States Circuit Court of Appeals for the Fifth Circuit is set out in full at pages 123 and 128 of the Record, reported in 116 Federal (2d) 270.

-II-

(1) The date of the judgment to be reviewed is December 12th, 1940, while Petition for Rehearing was denied upon the 1st day of February, 1941 (Tr. p. 147).

(2) The statutory provision believed to sustain the jurisdiction of this Court is set forth under Title 28, Sec. 347, Judicial Code 240, Supreme Court Rule 38.

(3) The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (Tr. p. 123) and the order denying Appellant's Motion for Rehearing (Tr. p. 147, Motion p. 130) sustains the jurisdiction of a Federal Court sitting in Equity, not in Bankruptcy, to effect a composition of creditors in a Class Action, and bind this Petitioner, who was a non-resident residing in Chicago, Illinois, through service by publication (Tr. p. 51). All of such proceeding being predicated upon an attempted Class Action filed on March 12th, 1936, by *William J. Meredith et al vs. City of Ennis, Texas*, in the Federal District Court for the Northern District of Texas, after the passage of the Municipal Bankruptcy Act of May 24th, 1934, Chapter IX, Sec. 78-80, 11 U.S.C.A., 301 et seq., which conferred jurisdiction on Federal Courts sitting in Bankruptcy and not in Equity. This act was held unconstitutional by this Court in *Ashton vs. Cameron Co. Water Imp. Dist. No.* 1, 298 U.S. 541, 56 S. Ct. 901, on May 25th, 1936, but was in force and effect at the time of the filing

of said suit, viz: March 12th, 1936. The Amended Bankruptcy Act, 11 U.S.C.A., Sec. 401 et seq., 50 Statutes 653, became a law August 16th, 1937, which was prior to the time the decree in said cause was rendered on September 23rd, 1937.

This raises the following important questions:

(A) Did the Federal District Court have jurisdiction to consider such a class action in equity, between municipal bondholders, and render such a decree as was rendered in the Meredith case, the effect of which is to force a composition of creditors, after the passage of the Municipal Bankruptcy Act, of May 24th, 1934, which conferred such jurisdiction on Bankruptcy Courts?

(B) Had Congress, prior to the passage of the Municipal Bankruptcy Act, ever conferred jurisdiction upon Federal Courts, sitting in equity in a class action, to render a decree binding non-resident municipal bondholders by publication, and effect a composition of creditors?

(C) Has the Federal Court sitting in equity in a class action the power to render a decree and bind a nonresident municipal bondholders by publication notice, which impairs the obligation of its pre-existing contract, and take its property without due process of law?

(4) The cases believed to sustain said jurisdiction are as follows:

Forsyth vs. Hammond, 166 U.S. 506, 41 L. Ed.

1095; 17 S. Ct. 665.

Hamilton Brown Shoe Co. vs. Wolf Bros. & Co., 240 U.S. 251; 60 L. Ed. 629; 36 S. Ct. 269.

Baum vs. Coty, 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531.

-III-

STATEMENT OF THE CASE

This has already been stated in the preceding Petition, Par. I, page 2 et seq., which is hereby adopted and made a part of this brief.

-IV-

SPECIFICATIONS OF ERROR

(A) The Court erred in holding that the Federal District Court for the Northern District of Texas, sitting in Equity, had jurisdiction to render the decree in the case of *William J. Meredith et al vs. City of Ennis, Texas*, No. 3650-906, and bind this Petitioner, a non-resident bondholder, through publication notice, which was filed and a decree rendered therein after the passage by the Federal Congress of the Municipal Bankruptcy Act, Chapters IX, Sections 78 to 80, 81 to 84, 11 U. S. C. A. 301 and 401 et seq., 48 Statutes 798, and 50 Statutes 653, which conferred such power upon Federal Courts sitting in bankruptcy.

(B) The Court erred in holding that the case of William J. Meredith et al vs. City of Ennis, Texas, et al, No. 3650-906, was such a class action that bound this Petitioner.

(C) The Court erred in finding that this Petitioner, after judgment, electing to come into this Cause and make a direct attack upon the decree in the Meredith case, asserting it was not bound by it, waived or released any right it might have in Civil Action No. 10 to the levy of a tax to pay its original bonds and the judgment therein rendered.

(D) That the Court erred in finding that this Petitioner's Original Petition in Civil Action No. 10, filed October 7th, 1938, and its Plea of Intervention filed May 19th, 1939, comes too late to modify the decree under Title 28, Sec. 118 of the U.S.C.A., Judicial Code 57.

(E) That the Court erred in holding that this Petitioner in its Plea of Intervention failed to serve any of the parties in the case of William J. Meredith et al vs. City of Ennis, Texas, et al, No. 3650-906 in Equity.

(F) That the Court erred in refusing to require the City to reimburse the Interest and Sinking Fund Account of Ennis, Texas, Street Paving Bonds, Series No. 2, dated May 10th, 1923, to the extent of $4,898.91, which was the Petitioner's pro rata part of the $6,850.22 wrongfully taken out of the Interest

and Sinking Fund Account in the Meredith case, without its consent or agreement thereto.

(G) The Court erred in failing to grant to this Petitioner, as prayed for in its Petition for Intervention in the Meredith case, its share of the taxing power of the City of Ennis to pay its unrefunded bonds, regardless of the decree in the Meredith case.

-V-

SUMMARY OF THE ARGUMENT

-A-

POINT 1: Jurisdiction has never been conferred by Congress on a Federal Court sitting either in law or in equity, to render a decree, the effect of which will cause composition of municipal debts. This has been long recognized by Congress and by the Courts of this country, and especially this Court in *United States vs. Bekins*, 304 U.S. 27, 58 S. Ct. 811, as this Court here recognized that there is no Forum in which taxing agencies might force a composition of their debts, which creates a necessity for the Muni cipal Bankruptcy Act,, 11 U.S.C.A. 301 and 401 et seq., 50 Statutes 653; *Perry County, Ky., vs. Catholic Order of Foresters*, 17 Fed. Sup. 316; *Women's Catholic Order of Foresters vs. Arlington*, 28 Fed. Supp. 663; *Ladew vs. Tennessee Copper Co.*, 218 U. S. 358, 31 S. Ct. 81, 54 L. Ed. 1069. If a Court in Equity had that power in a class action, then there was no necessity for the Municipal Bankruptcy Act.

Under our various Assignments of Error to the United States Circuit Court of Appeals, they were directed to the holding of the Court that the judgment rendered in the suit of *William J. Meredith et al vs. City of Ennis, Texas*, No. 3650-906, is void as to this Petitioner, as only Courts of Bankruptcy have the power to render a decree that would bind it to accept refunding bonds. The particular question of jurisdiction was raised in the trial court and in Motion for Rehearing to the United States Circuit Court of Appeals (Tr. p. 132), which was refused.

The question of jurisdiction can be raised any time, without previous Assignment of Error, and it is the duty of the Circuit Court to take notice of lack of jurisdiction of the inferior court. *Morrison vs. Burnette*, 154 Fed. 617, appeal dismissed; *Laurel Oil & Gas Co. vs. Morrison*, 212 U.S. 291, 29 S. Ct. 394,, 53 L. Ed. 517; *Toledo Newspaper Co. vs. U.S.* 237 Fed. 986, affirming 220 Fed. 458 and affirmed, 247 U.S. 402, 38 S. Ct. 560, 62 L. Ed. 1186; *Spencer vs. Patey*, 243 Fed. 555; *Supreme Council of Royal Arcanum vs. Hobart*, 244 Fed. 385; *Chicot Drainage Dist. vs. Baxter State Bank*, 308 U.S. 376, 60 S. Ct. 319.

POINT 2: The decree in the Meredith suit was rendered in Equity and the Court was not sitting in Bankruptcy, therefore it had no power at the time the decree was rendered to enter a decree binding this Petitioner, and forcing it to accept bonds of different maturities and different rates of interest, as a Bankruptcy Court was the only Forum available to accom-

plish a composition of creditors.

The Bankruptcy Statute was in full force and effect at the time the W. J. Meredith suit was filed, viz: On March 12th, 1936, as Chapter IX, Sec. 78-80, 11 U.S.C.A. 301, became a law on May 24th, 1934, and was not held to be unconstitutional until the decision in *Ashton vs. Cameron Co. Water Imp. Dist. No.* 1, 298 U.S. 541, 56 S. Ct. 901, on May 25th, 1936. The Bankruptcy Act was amended, Chapter IX, 11 U.S.C.A. 401, 50 Statutes 653, which became a law on the 16th day of August, 1937, while the decree entered in the Meredith suit was not rendered until September 23rd, 1937.

This Court expressly holds that the actual existence of the Statutes is an operative fact and cannot be justly ignored: *Chicot Drainage Dist. vs. Baxter State Bank*, 308 U.S. 374, 60 S. Ct. 317.

The Bankruptcy Act being in full force and effect at the time the Meredith suit was filed, and the jurisdiction having been conferred upon Courts of Bankruptcy, and likewise being in effect before the decree was filed, then that Court and that Court alone had jurisdiction to bind this Petitioner and force it to accept bonds of different rates of interest and different maturities, as provided in the original bond contract. It is only in the Bankruptcy Court that you can impair the obligation of this Petitioner's pre-existing bond tract, as held in *United States vs. Bekins*, 304 U.S. 27, 58 S. Ct. 811; holding it cannot be impaired; *City of Austin vs. Cahill*, 99 Tex.

175; 88 S.W. 542; *Constitution of the United States*, Art. 1, Par. 10; *Murray vs. Charleston*, 96 U.S. 436, 34 L. Ed. 760; *Mobile vs. Watson*, 116 U.S. 289, 6. S. Ct. 398, 29 L. Ed. 620.

The Meredith decree, which this Petitioner has assailed through its Assignments of Error as not binding upon it, takes this Petitioner's property, viz: Its interest and sinking fund, as well as the taxing power belonging to it, without due process of law; this cannot be done in a decree entered in a class action filed in equity by one bondholder against non-resident bondholders, who were neither party plaintiffs nor defendants in said class suit, had no notice, except by publication, and did not consent thereto or ever accept the benefits of said decree, as was held in:

Women's Catholic Order of Foresters vs. City of Arlington, 28 Fed. Sup. 663;

Brooklyn vs. Ins. Co., 99 U.S. 368, 370; 25 L. Ed. 416.

Cooper vs. Reynolds, 10 Wall 308; 77 U.S. 308.

Empire vs. Darlington, 101 U.S. 87.

St. Clair vs. Cox, 106 U.S. 350-353; 1. St. Ct. 354.

Pana vs. Bowler, 107 U.S. 529-545; 2 S. Ct. 704.

Harrigan vs. Pounds, 265 N.Y. Sup. 676.

Wabash vs. Adelbert College, 208 U.S. 28-57; 32 L. Ed. 379; 28 S. Ct. 182.

Compton vs. Jessup, 68 Fed. 263.

Hamer vs. N. Y. Ry. Co., 244 U.S. 266; 61 L. Ed. 1125; 37 S. Ct. 511.

Blaylock vs. Small, 127 U.S. 96-104.

Ayer vs. Kemper, 48 Fed. (2d) 11.

This Petitioner being bound only through publication notice (Tr. p. 51), such constitutes a failure of due process, as the procedure here did not protect it, an absent party, to its fair share of either money or taxing power.

C. B. & Q. Ry. vs. Chicago, 166 U.S. 226, 235; 17 S. Ct. 581, 584; 41 L. Ed. 979.

Hansberry vs. Lee, 311 U.S. 32, 61 S. Ct. 118, decided Nov. 12, 1940.

Women's Catholic Order of Foresters vs. Arlington, 28 Fed. Sup. 663.

-B-

We feel that the Court erred in holding that the Meredith suit was such a class action as would bind this Petitioner, and is contrary to both the law and the evidence. The facts are that this Petitioner owned $25,000.00 of City of Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, and the issuance of these bonds creates a separate and distinct contract from all of the other bonds issued by the city. There were eleven separate and distinct issues (Tr. p. 21), and the ordinance itself and the Constitution and Laws of the State of Texas, provides for an election to be held and authorize the levy of a tax upon the property within the city to pay each particular issue of bonds. It is provided that when said tax is collected, it shall be placed in a separate and distinct fund, and can be used for no other purpose, save and except to pay these bonds, as provided in Articles 707, 839, and 1015, of the Revised Civil Statutes of the State of Texas.

Therefore, in order for the Plaintiff, W. J. Meredith, to file a class action that would bind this defendant, it would be necessary at the time of the filing of the suit for him to own and possess bonds of the same series, so that he would be in privy with this Petitioner and be able to stand for and bind it, as each issue of municipal bonds represents a different class and creates a separate trust to provide for payment of that particular issue, and holders of bonds of another issue are not in the same class, in the sense that their interests are identical, so that they can act for them.

Here in this case the facts are that Meredith took from the trust funds of this Petitioner's bonds the sum of $6,850.22 (Tr. p. 102) and placed it in a special fund for all the bonds, and left only $2,667.09 in the special fund for this Petitioner's bonds, and nothing in the interest and sinking fund. This Petitioner was entitled to the sum of $4,898.91 as its proportionate part of said earmarked fund (Tr. p. 78 and 106), which was in truth and fact dissipated in an Equity Court.

Meredith and all other plaintiffs were officers of the Brown-Crummer Investment Company of Wichita, Kansas (Tr. p. 2) who made and entered into a refunding agreement with the City of Ennis (Tr. p. 14-20), and after the filing of said suit later acquired $423,000.00 of the total bonds of said city, as alleged in his Third Supplemental Bill of Complaint (Tr. p. 9-11) filed on the day the decree was entered; which was necessary in order to perfect

the refunding agreement; $14,500.00 were bonds of the same series as the ones owned by this Petitioner. We believe the evidence shows that these plaintiffs did not stand for this Petitioner or have identical interests, but were interestd in the larger amount of bonds, of other classes and other trusts, and took from the earmarked trust fund of this Petitioner's bonds and used it to rehabilitate the insufficient trusts of the other $408,500.00 bonds which they had acquired. This fact alone shows that plaintiffs did not meet the requirements as a representative with identical interests in class action, so that they could stand for this Petitioner, as laid down by the Supreme Court in *Hansberry vs. Lee*, 311 U.S. 312, 60 S. Ct. 115, decided Nov. 12th, 1940; *Georgetown vs. Alexander Coal Co.*, 37 U.S. 91, 9 L. Ed. 1012; *Ayer vs. Kemper*, 48 Fed. (2d) 11; *Bickford vs. Federal Reserve Bank*, 5 Fed. Sup. 875; *Mass. vs. Sullivan*, 207 N. Y. Sup. 181.

The mere allegation that the suit was brought on behalf of all who should join and pay the expense, and who were to be paid from the levies of a tax, is not a sufficient allegation to bind this Petitioner, and contrary t othe reasoning of this Court in *Compton vs. Jessup*, 68 Fed. 263; *Wabash vs. Adelbert College*, 208 U.S. 38-57; 32 L. Ed. 379; 28 S. Ct. 182; *Women's Catholic Order of Foresters vs. Arlington*, 28 Fed. Sup. 662; *Hamer vs. New York Ry. Co.*, 244 U. S. 266; 61 L. Ed. 1125; 37 S. Ct. 511.

We feel the decree itself as rendered was not a decree rendered in a class action, but one purely and

simply as a consent decree, which would bind only those who agreed to it. *Myllius vs. Smith*, 53 W. Va. 173, 448 S.E. 542; *Hodgson vs. Vroom*, 266 Fed. 267; *Conn vs. Penn*, 18 U.S. 424; 5 Wheaton 426. Being a consent decree certainly could not bind this Petitioner through citation by publication, unless it voluntarily appeared and entered therein.

The Court cannot enter a consent decree entirely without the scope of the pleadings, or on a cause of action other than that stated in the pleadings. *State vs. Muench*, 217 Mo. 124, 117 S.W. 25; *Roseborough vs. Ansley*, 35 O. St. 107; *Schmidt vs. Gold Min. Co.*, 28 Ore. 9; 40 Pac. 46.

The facts are that Meredith, Rogers and Martin, officials and attorneys of the Brown-Crummer Investment Company, filed suit on March 12th, 1936, and on June 10th of that year (Tr. p. 10), Judge Phillips, representing the city, argued a motion to dismiss, and the case to that stage was very highly contested between the city and the plaintiffs. After that, on the 21st day of June, 1937, the city entered into a contract with the Brown-Crummer Investment Company to refund its bonds, and there it lost every scintilla it ever had of a contested suit or class action. The plaintiffs had agreed to acquire 75 per cent of the par amount of outstanding bonds and warrants of the city (Tr. p. 20) under a refunding plan, and the city agreed to pay the Brown-Crummer Investment Company $17.50 per thousand for assembling the bonds and making the exchange, and agreed with them as to the levy of taxes to support

the outstanding bonds who accept the terms of the proposal (Tr. p. 19). This being adopted in the pleadings of the original plaintiffs (Tr. p. 9-10-11), and in the pleadings by the city (Tr. p. 11-14), it lost all elements of a class action and the decree itself, when entered, became a decree between consenting parties, and it so states (Tr. p. 22) in the decree. The entire object was to adjust and compromise the controversy (Tr. p. 14), as provided in the refunding agreement, and the decree itself was approved by the attorneys for the complainants and respondents (Tr. p. 48). The decree finds that the contract entered into by and between the Brown-Crummer Investment Company and the city had been consented to and adopted by the complainants and respondents, and the contract itself was approved (Tr. p. 24). In order that all parties thereto are authorized and directed to perform all things necessary to effect and carry out the contract (referring to the refunding contract) and in the decree (Tr. p. 46) the Court finds that both parties have *consented* (italics ours) in open court, and waive any right to appeal, meaning the consenting parties. Therefore, they could certainly not bind non-appearing bondholders, through publication notice, not to appeal, and agree to a refunding contract it had never seen or contemplated in the original petition or notice. Clause III of the decree deals only with the $423,000.00 bonds before the Court (Tr. p. 25-36), and out of the total outstanding $43,500.00 Street Paving Bonds, Second Series, dated May 10th, 1923, the decree finds that only Bonds Nos. 56 through 80, aggregating $14,-

500.00 are valid outstanding and binding obligations, and ordered them exchanged for refunding bonds (Tr. p. 27-35-36), none of which belonged to this Petitioner. In the decree in Clause XIX (Tr. p. 47) it used these words—"the complainants herein and any and all holders of all bonds and warrants exchanged for refunding bonds, are decreed to have notice and knowledge of all the terms of the refunding bond contract, dated June 21st, 1937, and to have consented and agreed to all of the terms thereof." None of the bonds of this Petitioner were described in the pleadings in said suit and in the decree, and we contend this clause is sufficient to make this binding only on the consenting parties. Clause XX of the decree (Tr. p. 47) retained jurisdiction "to hear, determine and adjudicate, the validity of the claims of all persons, firms or corporations, who claim to be the holders of obligations of the Respondent, not *declared* (italics ours) upon, and described in the pleadings of the complainant heretofore filed," —and "to hear, determine and adjudicate the equitable rights and interests, if any, of any such claimant, in and to the balance of the interest and sinking fund remaining on hand of respondent city, after the disbursements herein authorized, have been made in accordance with the decree, and the delinquent taxes owing to the respondent city."

Therefore, considering the entire suit, we believe that it lacks the elements of such class action as would bind this Ptitioner, and that the Court has committed error in its finding of fact and conclusions of law, that this Petitioner was bound by said

decree, which on its face is merely a consent decree to carry out the refunding program, and binds only those creditors who consented and were actually before the Court.

This Petitioner was a necessary party and must necessarily be joined and served in order to bind it. It has the right to fight for the proper distribution of taxes pledged to support its bonds, and its share of the money on hand, and especially in its trust fund, and it has the right to be heard, so that it could force the city to apply the sum of $25,430.60 on hand March 1st, 1937, to the payment of the Waterworks and Sewer Bonds which were not dealt with or taken into consideration or disbursed to creditors under the refunding plan or at the time said decree in the Meredith suit was entered (Tr. p. 101). This amount was available under the charter to pay any waterworks or sewer bonds issued by the city (Tr. p. 105), and of which there were outstanding $53,000.00 Water System Bonds, dated August 15th, 1925; $30,000.00 Sewer Bonds, dated September 15th, 1926; $29,000.00 Water and Sewer Bonds, dated July 10th, 1923, and $39,000.00 Water and Sewer Bonds dated October 10th, 1923, a total of $151,000.00 (Exhibit A, Tr. p. 21) which would have released sufficient tax funds to pay this Petitioner and the remainder of the bonds in full, if it had been so applied.

Such a decree as entered is contrary to the principles of good faith as found by this Court in *United Mutual Life Ins. Co., Petitioner, vs. Avon Park, Fla.*, 61 S. Ct. 157, 85 L. Ed. 112, decided on November

25th, 1940, Case No. 31, holding that a composition of Municipal Indebtedness can only be accomplished by a Federal Court sitting in bankruptcy, and affording the bondholders all of the protection of the Bankruptcy Act, to the end that all bondholders may be afforded a degree of good faith.

-C-

This Petitioner having elected to come into this Cause and make a direct attack did not waive any rights to the levy of a tax for the collection of its judgment, or its original bonds, which have never been exchanged.

The decree in the Meredith case was collaterally attacked in Civil Action No. 10 by this Petitioner, wherein it asked for mandatory relief and the use of funds allocated out of taxes to pay its bonds, contrary to the disposition of the funds and taxes prescribed in the decree (Tr. p. 51).

The city answered that the Court had exclusive jurisdiction in the Meredith suit to determine these rights. On January 25th at the trial of Civil Action No. 10 (Tr. p. 52) the Court held that this Petitioner should have its day in Court, and should take it in the Equity case, as the decree bound this Petitioner in so far as this Forum is concerned. In order that this Petitioner might not be bound (Tr. p. 54) the Court said he would open the decree for this Petitioner, if it desired to offer testimony in that cause —giving this Petitioner the right to have its origi-

nal suit dismssed, or file a Plea of Intervention. On February 1st, after further argument, the Court gave Petitioner a judgment, and did not dismiss the suit, and opened the decree (Tr. p. 58-5), so that Petitioner could come in and make a direct attack and assert its rights. The Forum in which this Petitioner could make its attack was the original Meredith suit. The decree itself held it open for that purpose and the Court opened it, which is in accordance with the holding of this Court in *Chicot Drainage Dist. vs. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317; Hawley *vs. Fairbanks*, 108 U.S. 543; 2 S. Ct. 846.

This Petitioner entered the Meredith suit and made a direct attack, both in its Plea of Intervention (Tr. p. 64) and its Motion to Modify the Decree (Tr. p. 91), alleging that it was not a party to said decree and was not bound. It asked that the City of Ennis be ordered to reimburse the Interest and Sinking Fund Account of Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, to the extent of $4,898.91, and also asked for its share of the money collected from delinquent taxes of specific levies made for this Petitioner's bonds, prior to the year of 1936, and collected since that date, which is dealt with and taken without its consent. That the city be ordered to withdraw from the Interest and Sinking Fund Account of Ennis, Texas, Refunding Bonds, Series 1937-C, which included $25,000.00 Refunding Bonds to take up this Petitioner's bonds never exchanged, and in which there was a surplus of $4,500.00, and place it in the Interest and Sinking Fund Account of this Petitioner's bonds, in lieu of

the omitted tax levies made to pay this Intervener's bonds for the years of 1937, 1938 and 1939, as a failure to levy a tax to support a prior bond issue, is automatically levied from year to year, when it is omitted from the annual tax levying ordinance, which was so held in the case of *City of Waco vs. Mann*, 127 S. W. (2d) 879. Intervenor further prayed for tax levy to support its original bonds and asked that the judgment be modified, if necessary, so that such tax could be levied, the Court having held that this was the *only Forum open for such relief* (Tr. p. 52) (italics ours). We opine, how can it be said that we waived these rights in the original cause of action by coming here and making a direct attack upon the judgment plead in defense by the city in Civil Action No. 10? In other words, the District Court held we could not make a collateral attack in Civil Action No. 10. We came in and made a direct attack in the Meredith suit and the Court holds that we have waived our rights to relief by coming into the very Forum that he opens to us for that purpose. We feel that this is reversible error.

-D-

We feel that the Court has committed error in finding that this Petitioner is prevented from complaining of the equities in the former class suit, as more than a year had elapsed since the entry of said decree before Petitioner filed its original suit. The equity decree is held open specifically by its terms for this Petitioner to enter therein and assert its rights (Tr. p. 48), with no provision when it shall become

final. Title 28, Sec. 118, U.S.C.A. and (Judicial Code 57) does not apply to this kind or type of suit, but applies solely to the purpose of aiding, assisting and forcing of equitable liens, or removing encumbrances or clouds of title from real and personal property. The Supreme Court having held in *Brooklyn vs. Insurance Co.* that the statute was not applicable to purported class action by one bondholder seeking to enforce the collection of taxes for the benefit of all. Then naturally this statute would not apply as a limitation against this Petitioner to enforce its rights herein—especially in view of the fact that long prior hereto, in Civil Action No. 10, the decree was reopened, and at that time the Appellee neither filed or lodged any exception to the Court's reopening of the decree, it cannot now come in at this late day and be heard to complain. In view of the fact that the original decree was held open to hear, ascertain, determine and adjudicate the equitable rights of holders of all obligations of respondent city, not declared upon therein, the city being a party to that decree and agreeing thereto, it is now estopped from claiming that this appellant's rights to intervene and attack such decree should be barred, unless filed within one year, when it was acting as the cestiu que trust for the Petitioner's bonds, and unless the city can show that the fund is available to pay on the debt, it cannot take advantage of its own wrong by pleading the Statute of Limitation; so held in *Denver-Greeley Irr. Dist. vs. McNeil*, 80 Fed. (2d) 929; *Lincoln Co. vs. Luning*, 133 U.S. 530; 33 L. Ed. 766; 10 S. Ct. 363; *Perez vs. Perez*, 220 U.S. 224; 31

S. Ct. 412-414; 55 L. Ed. 443; *Hawley vs. Fairbanks*, 108 U.S. 543; 2 S. Ct. 846.

Robertson vs. Blaine Co., 90 Fed. 63, 47 L.R.A. 459.

Hubben vs. City of S. Hutchinson, 64 Kan. 645, 68 P. 52.

Rogers vs. City of Omaha, 82 Neb. 118, 117 N. W. 119.

We further believe that such defense would not be available, as this Petitioner was not before the Court, as it was not bound by Publication Notice, as held in:

Chase Nat'l. Bank v. City of Norwalk, 291 U.S. 431; 54 S. Ct. 475.

Brooklyn vs. Insurance Co., 99 U.S. 362-370.

Pana vs. Bowler, 107 U.S. 529; 2 S. Ct. 704.

Brown vs. Crawford, 252 Fed. 248.

Tex. & Pac. Ry. Co. vs. Johnson, 76 Tex. 432; 12 S.W. 463; 151 U.S. 102.

Women's Catholic Order vs. Arlington, 28 Fed. Sup. 663.

Harrigan vs. Pounds, 1933, 265 N.Y. Sup. 676.

Mass. vs. Sullivan, 207 N.Y. 181.

Compton vs. Jessup, 68 Fed. 263.

E

The findings of the trial court and affirmance by the Circuit Court of Appeals, that Petitioner failed to serve all parties in the Original Equity Decree is contrary to the evidence and prior finding of the District Court (Tr. p. 62 and 61). The Order authorizes and shows a copy of the Petition of Intervention was mailed to each of the attorneys of plaintiffs and defendants in the Meredith suit, in accordance with the Supreme Court Rules, and the special

finding of the Court that service was completed March 5th, 1940, and as no objection or exception being taken to such finding as shown by the record (Tr. p. 62-61), the City cannot raise the question.

The Judgment in Civil Action No. 10 (Tr. p. 59-61), Clause III, provides that the Meredith suit shall stand reopened when Plaintiff by appropriate proceedings in said Cause seeks the right to demonstrate that such Decree is improper, unfair or improvidently entered, with regard to the levy, assessment and collection of taxes. The Court had retained jurisdiction for that very purpose in the Meredith Decree (Tr. p. 47, Clause XX), and certified the judgment into this Cause. When the Court passed an order permitting this Petitioner to intervene and made an affirmative finding, that all parties at interest had been served with a copy of its Plea of Intervention, as provided by Supreme Court Rules (Tr. p. 62), such finding is conclusive as against the City, unless it is attacked and some affirmative evidence introduced showing that such finding is in error. No such testimony was offered or such finding justified by the Trial Court, which constitutes reversible error.

The relief asked for by this Petitioner is against the city, but even if the service had not been completed, as provided by the Rules of this Court, No. 4 and 24C, bondholders are not necessary parties, as is held in *Austin vs. Cahill*, 99 Tex. 175, 88 S. W. 542 (19):

> "That the holders of Refunding Bonds are not necessary parties in their own person, but are constructively present and represented through the city in a suit by the Original Bondholders to enforce the levy of a tax to pay original bonds not surrendered for refunding."

This suit is not analagous to the case of *City of Alvarado vs. Christian*, 100 Fed. (2d) 156, as held by the Circuit Court, as here all of the holders of bonds, save and except this Petitioner, have heretofore voluntarily appeared before the Court and accepted refunding bonds. This Petitioner's right to its collection does not depend upon retribution from the holders of refunding bonds, but upon the ability of the city to pay its obligations from tax sources. The Transcript (pp. 102-104) discloses that it has sufficient taxing power to pay refunding bonds, and that there is also ample taxing power to pay this Petitioner's bonds under its contract. Taxing power of 17 cents is ample to support refunding bonds, Series "C," and 11 cents would be more than sufficient to pay the principal and interest upon this Petitioner's bonds, especially in view of the excessive tax of 29 cents having been levied in 1937 and 1938, and a tax of 28 cents having been levied in 1939 to pay refunding bonds, Series "C," which has created a large surplus in its Interest and Sinking Fund Account.

All other bondholders have notice in the original decree that it is held open to the Petitioner to assert its rights and adjust its equities, as to both the money

and the taxes. The Court had only power to deal with funds on hand and taxes for the ensuing year. Taxes to be levied in 1939 could not be dealt with in 1937, as this power is vested in the legislative branch of our Government. Can it be said that refunding bondholders under the terms of this decree are even necessary parties to this Petitioner's suit for relief through a tax levy for 1939 to pay its judgment? We think not.

-F-

This Petitioner is entitled in this action to have its trust funds rehabilitated by the city to the extent of $4,898.91, which is this Intervener's pro rata part of the $6,850.22 wrongfully taken out of the Interest and Sinking Fund Account in the Meredith decree. This fund is the accumulation of money collected from tax levies made for this specific bond issue. Under Texas Constitution, Art. 11, Sec. 5 and 6, and Revised Civil Statutes No. 707, 839 and 1015, these funds can be used for no other purpose except to pay the particular bonds for which the money is collected. They constitute a trust fund for that purpose. *Hidalgo County Imp. Dist. No.* 1 *vs. Morey*, 74 Fed. (2d) 101; *U. S. ex rel Von Hoffman vs. Quincy*, 4 Wall 535; 18 L. Ed. 403; *Board of Liquidation of La. vs. McComb*, 92 U.S. 531, 23 L. Ed. 625; *Galena vs. Amy*, 5 Wall, 705; 18 L. Ed. 560; *Mobile vs. Watson*, 116 U.S. 289, 6 S. Ct. 398; 29 L. Ed. 620; *Jenkins vs. Entzminger* (Fla.) 135 So. 785.

The District Court in the Meredith case was without authority to take trust funds created by the

collection of a specific tax for Ennis, Texas, Street Paving Bonds, Second Series, dated May 10th, 1923, and utilize them for the payment of another bond issue, and the city is liable to this Petitioner in this suit for a rehabilitation of the trust, to the extent of the money wrongfully withdrawn. The taking of its trust funds in the light of the Texas Statutes and authorities here cited takes its property without due process of law, and the refusal of the trial court and Circuit Court to require the levy of a tax to rehabilitate this specific trust constitutes reversible error.

-G-

The United States Circuit Court of Appeals, in holding that the Meredith suit having utilized the entire taxing power for refunding bonds, is conclusive against this Petitioner as to its share of the taxing power of the City of Ennis to support its unrefunded bonds, as prayed for, is error.

The evidence shows that there has been no levy for this Petitioner's bonds since the year of 1936, nor has there been any money placed in the Interest and Sinking Fund Account from delinquent tax collections levied prior to 1936, and collected since that date, nor have any funds been transferred to the Interest and Sinking Fund Account of this Petitioner's bonds (Tr. p. 102). The Bond Contract provided for the levy each year (Tr. p. 108) of a specific amount to pay the bonds, and if the decree in itself took away the entire taxing power of the city and applied it to the payment of other bonds, then this Petitioner has the right to complain of said decree

and come into the very court, which took away its substantive right, to the levy of a tax to support its bonds and enforce such levy. Its right to enforce the tax levy has been held in the following cases:

Hawley vs. Fairbanks, 108 U.S. 543; 2 S. Ct. 846.

Rorick vs. Board of Com. Everglade Drainage Dist., 57 Fed. (2d) 1048.

Revised Civil Statutes of Texas, Art. 707 and 839.

Texas Constitution, Art. XI, Sec. 5 and 6.

Wade vs. Travis Co., 174 U.S. 506; 19 S. Ct. 715; 43 L. Ed. 1080.

City of Waco vs. Mann, 127 S.W. (2d) 879.

Mitchell Co. vs. Bank, 91 Tex. 361; 43 S.W. 880-883.

In *City of Aransas Pass et al vs. Keeling*, 113 Tex. 339, 247 S.W. 818, 821, the Court held:

> "It is settled that the actual levy by city authorities of an adequate tax is not essential to comply with the constitutional provision, where the law itself under which municipal bonds are issued mandatorily requires an adequate tax levy. As declared in Judge Brown's good opinion in *Mitchell Co. vs. Bank*, 91 Tex. (361) 370, 43 S. W. (880) 883, and expressly sanctioned by the Supreme Court of the United States in *Wade vs. Travis Co.*, 174 U.S. (499) 506, 19 S. Ct. 715, 43 L. Ed. 1080."

> " 'What the Constitution requires is that provision shall be made at the time or shall have been previously made, by which the rate of tax to be levied is so definitely fixed, as done in the case last cited—that it becomes merely a ministerial act to determine the rate to be levied. The Leg-

> islature has the power to make all such 'provision' for counties and cities, or it may leave it to the officers of such corporations to make it when the debt is created; if made by either it is sufficient..' "

In the *City of Waco vs. Mann*, 127 S.W. (2d) 879, the Supreme Court of Texas held that a tax levy to support an issue of refunding bonds is good where a sufficient margin of the taxing power remained to service outstanding bonds, where the tax-levying ordinance failed to make a specific levy for each of them.

> "Where law under which authorized bonds are issued specifically requires an adequate tax levy, a tax to support issue is automatically levied from year to year whether a specified rate is fixed or not."

In this case there were no levies and collections made by the City of Ennis, Texas, for Street Paving Bonds, Series No. 2, dated May 10th, 1923, for either of the years 1937, 1938, and 1939 (Tr. 102). At the time these bonds were issued there was levied for the years of 1936 the sum of $3,686.25, being $1,500.00 for principal due April 10th, 1937, and $1,113.75 for interest due April 10th, 1937, and $1,072.50 for interest due October 10th, 1937. For the year 1937, the sum of $3,603.75 was levied, being $1,500.00 principal due April 10th, 1938, and $1,072.50 for interest due April 10th, 1938, and $1,031.25 for interest due October 10th, 1938. For the year 1938 there was levied the sum of $3,521.25, being $1,500.00 for principal due April 10th, 1939,

and $1,031.25 for interest due April 10th, 1939, and $990.00 for interest due October 10th, 1939. For the year of 1939 there was levied the sum of $3,428.75, being $1,500.00 for principal due April 10th, 1940, and $990.00 for interest due April 10th, 1940, and $948.75 for interest due October 10th, 1940 (Tr. p. 108).

Under the Texas authorities it is the ministerial duty of the City Commission to determine the levy. Where it fails to do so, it is automatically levied, and this Petitioner certainly has the right to go into this very suit which dealt with the taxing power of the city, and obtain relief; enforce that which is pledged and given it under the bond contract, the Constitution and Statutes of Texas.

The evidence submitted at the trial shows that here there has accumulated a large surplus in the Interest and Sinking Fund Account of Refunding Bonds, 1937 Series "C," collected from excessive tax levies in 1937, 1938 and 1939 (Tr. p. 103).

Therefore, it is our contention that any construction that this decree delegates the full taxing power of the City of Ennis for refunding bonds, is void as to this Petitioner, and of no force and effect, and that the tax for this Petitioner's bonds was automatically levied, and it is entitled to have the money collected from tax levies made for Refunding Bonds 1937 Series "C" reapportioned for each of the years of 1937, 1938 and 1939, and applied in this very suit to the payment of its unrefunded bonds. The city and the Court approving, having utilized

the entire taxing power of the city for refunding bonds for the year 1937, takes away and impairs the bond contract entered into by the city, in which it agreed to levy taxes to pay Petitioner's bonds at maturity; and the holding of the Court requiring this Petitioner to accept refunding bonds, in order to secure its pledged tax, constitutes reversible error, as such decree is void as to it.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this application be granted, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit and the United States District Court for the Northern District of Texas, be reversed and judgment rendered for this Petitioner, as asked for in its Amended Plea of Intervention in said cause.

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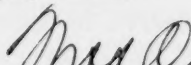
By 
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